80-246

Supreme Court, U. S.
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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

NO. 80-246

COMMUNITY GRAIN, INC.,
Petitioner,

vs.

COOK INDUSTRIES, INC.,
Respondent

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit.

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QUESTION PRESENTED FOR REVIEW

An option to purchase may not be exercised by silence alone in a case where the Petitioner agreed to sell grain for delivery in October through December, 1973, and Respondent did not exercise its option to call for delivery within that period of time.

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vs.

COOK INDUSTRIES, INC.,
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Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit.

Petitioner, Community Grain, Inc., urges this court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit rendered in this case on March 31, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered on March 31, 1980, is reported at 614 F.2d 978. A copy of that opinion is attached to this petition as Appendix A.

JURISDICTION

This court's jurisdiction is invoked under Section 1254(1), Title 28, United States Code. The decision of the Court of Appeals denying Petitioner's application for rehearing was issued on May 16, 1980. This petition is being filed less than ninety days thereafter, and is, therefore, timely. Supreme Court Rule 20.2 and Section 2101(c), Title 28, United States Code. Jurisdiction below was based on the diversity of the citizen-

ship of the parties, Petitioner being a Texas corporation and the Respondent being a Delaware corporation, and the amounts in controversy being in excess of $10,000.00.

STATEMENT OF THE CASE

In July, 1973, Petitioner, a country elevator operator, agreed to sell ten million pounds of grain to Cook Industries, Inc. with delivery to be called by Cook during the period of October through December, 1973. During the life of the contract, i.e., between October and December 31, 1973, Cook only called for delivery of five of the ten million pounds of grain.

As to those five million pounds which it did order, Cook insisted on delivery by rail at a time when no rail cars were available, also at a

time, however, when Cook did have its own rail cars available but offered none of those to the Petitioner. The price of grain rose dramatically between December and February. Prior to February, 1974, Cook did nothing to exercise its option as to the five million pounds of grain. It did not call for delivery of that portion of the contract.

In early February, 1974, Cook called for delivery of all ten million pounds of grain by truck or rail, and Cook even offered to provide for both truck and rail shipment. Petitioner was unable to deliver the grain because of the high price and was effectively out of business from that day forward.

REASONS FOR GRANTING THE WRIT

In this diversity case, the decision of the United States Court of Appeals is in conflict with the rulings of the Texas courts which it must follow. In diversity cases, the Federal Courts must follow the substantive law of the foreign state. Erie Railroad v. Tompkins, 304 U.S. 64 (1938); and Klaxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487 (1941).

The principal issue in this case concerns the exercise of an option. The issue relates specifically to Special Issue No. 1A submitted by the trial court to the jury upon request of the Respondent, Cook Industries, Inc. That issue was as follows:

> Do you find from the preponderance of the evidence that Cook Industries, Inc., exercised its option to store five million pounds of grain with Community Grain, Inc., commencing on January 1, 1974?

The jury answered in the affirmative.

Between December 31, 1973, and early February, 1974, Community Grain, Inc. sold its inventory of grain. It had no grain available at the time Cook called for the grain. The decision of the Court of Appeals raises serious questions because, contrary to the rules of the grain industry and contrary to Texas contract law, it is now possible to exercise an option by doing nothing. No Texas, or indeed federal, law was cited for the result reached by the Court of Appeals. This writer

is unable to find any support for the proposition that an option may now be exercised by silence or inaction in a case where no goods were delivered.

Under Texas law, an option to buy is an agreement which gives another the right to purchase during a specified period of time. It is seen as something in the nature of a promise by the seller to keep an offer to sell open for a specified period of time. Zeidman v. Davis, 342 S.W.2d 555 (Tex. 1961); and Hutcherson v. Cronin, 426 S.W.2d 638 (Tex. Civ. App., Tyler 1968), no writ history. If the buyer accepts the offer in the prescribed manner and during the life of the option, a contract is then created.

However, until the offer is so accepted or the option is exercised, it is ineffectual. Austin Presbyterian Theological Seminary v. Moorman, 391 S.W.2d 717 (Tex. 1965), cert. denied, 381 U.S. 957. It is submitted to this court that an option to buy cannot be exercised by silence and inaction to the detriment of the seller.

The decision of the Court of Appeals is in conflict with the decision of the highest court of the State of Texas, the foreign state. Accordingly, the decision of the Court of Appeals should be reviewed under this court's supervisory powers over Federal Courts.

PRAYER

For all the foregoing reasons, Petitioner prays that this court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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Attorneys for Petitioner
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BY _____
RAYMOND C. CABALLERO

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of July, 1980, a true copy of the foregoing brief was mailed to John Huffaker, Gibson, Ochsner, Adkins & Hankins, 500 First International Bank Building, Amarillo, Texas 79101, by certified mail, return receipt requested.

_____
RAYMOND C. CABALLERO

COOK INDUSTRIES, INC.,
Plaintiff-Appellee,

v.

COMMUNITY GRAIN, INC. and Bill R. Waldrep, Defendants-Appellants.

No. 77-3439.

United States Court of Appeals,
Fifth Circuit.

March 31, 1980.

Suits by buyer against seller for breach of contract and against seller's president for breach of fiduciary duty to seller's creditors, and by seller and its president against buyer claiming that buyer's agent wrongfully interfered with contractual relations that seller and its president had with bank, were consolidated. The United States District Court for the Northern District of Texas at Amarillo, Halbert O. Woodward, Chief Judge, entered judgment for buyer in interference action, and in favor of buyer on contract and breach of fiduciary claims, and seller and its president appealed. The Court of Appeals held that: (1) jury's explicit and implicit findings resolving factual questions, including whether and how to read certain rules of trade into contract, were supported by substantial evidence, and (2) special issue, which required finding of willful and intentional conduct in order to prove interference with seller's contractual relations with bank, was properly submitted to jury.

Affirmed.

1. Contracts ⇐176(1)

Although interpretation of contract is normally question of law for court, that interpretation frequently depends heavily on resolution of factual disputes, and it is function of trier of fact to resolve such factual disputes.

2. Sales ⇐87(3)

In suit by buyer against seller for breach of contract involving purchase of grain that seller allegedly failed to deliver, jury's explicit and implicit findings resolving factual questions concerning interpretation of contract, including whether and how to read certain rules of trade into contract, were supported by substantial evidence.

3. Federal Civil Procedure ⇐2233

Where seller's own requested instructions consistently referred to elements of willfulness and intent, and since under Texas law willfulness and intent are essential elements of claim of interference with contractual relations, special issue, which required finding of willful and intentional conduct in order to prove interference with seller's contractual relations with bank, was properly submitted to jury in seller's action claiming that buyer's agent wrongfully interfered with contractual relations that seller and its president had with bank.

Appeals from the United States District Court for the Northern District of Texas.

Before JONES, BROWN and RUBIN, Circuit Judges.

PER CURIAM:

This is an appeal from judgments in two consolidated cases. In the first case,

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APPENDIX A

Cook Industries, Inc. (Cook) sued Community Grain, Inc. (Community) for breach of a contract involving the purchase of grain which Community allegedly failed to deliver. Also in the first case Cook sued Community's President, Bill Waldrep, claiming breach of fiduciary duty to creditors of Community. In the second case, Community and Waldrep sued Cook, claiming that Cook's agent, John Tuggle, wrongfully interfered with contractual relations which Community and Waldrep had with the First National Bank of Hereford, Texas (the Bank). Specifically, Community and Waldrep claimed that Tuggle slandered them, causing the Bank to cancel Community's line of credit and call due all outstanding notes, and ruining Community's ability to borrow in the future.

The District Court entered a directed verdict against Waldrep in the interference action brought by Community and Waldrep, finding that Waldrep had no individual cause of action against Cook. The other matters were submitted to the jury on special issues as permitted by F.R.Civ.P. 49(a). The jury found in favor of Cook on the contract claim and judgment was entered against Community for $135,000. The jury found against Cook on the claim against Waldrep for breach of fiduciary duty. On the interference question, the jury found (i) that Tuggle interfered with Community's contractual relations while acting in the course of his employment, and (ii) that Community suffered damages as a result of that interference, but the jury also found (iii) that Tuggle did not have the requisite knowledge and intent to establish liability. Since an essential element of the cause of action was lacking, judgment was entered in favor of Cook. Community appeals the breach of contract judgment and both Community and Waldrep appeal the judgment in the interference countersuit. We affirm the judgments below.

[1, 2] In attacking the judgment in the breach of contract claim, Community contends that the District Court erred in not adopting as a matter of law Community's interpretation of the grain contract. The contract is, to put it mildly, ambiguous. Although the interpretation of a contract is normally a question of law for the Court, that interpretation frequently depends heavily on the resolution of factual disputes. And it is the function of the trier of fact to resolve such factual disputes. *Cf. General Wholesale Beer Co. v. Theodore Hamm Co.*, 567 F.2d 311, 313 (5th Cir. 1978). In this case, the District Court was faced with numerous factual questions, including whether (and how) to read certain rules of trade into the contract. These factual questions were resolved by the jury in the course of deciding the special issues.[1] We cannot say that the jury's explicit and implicit findings are unsupported by substantial evidence.

1. For example, Special Issue No. 1A stated: "Do you find from a preponderance of the evidence that Cook Industries, Inc. exercised its option to store 5 million pounds of grain with Community Grain, Inc. commencing January 1, 1974?" Special Issue No. 1B stated: "From a preponderance of the evidence find whether the parties to the agreement in question intended for the grain to be delivered in equal parts during each of the months October, November, and December 1973." Special Issue Nos. 1A and 1B were preceded by written instructions to the jury to "take into consideration all of the written terms of the agreements between the parties as well as the usages and customs of the trade in the manner which such agreements are carried out by persons engaged in the buying and selling of grain."

Community offers a laundry list of other challenges to the breach of contract judgment. We have considered these other challenges and find them to be without merit.

[3] In the interference with contractual relations action, Community contends[2] that the District Court erred in submitting to the jury Special Issue No. 12, which required a finding of willful and intentional conduct in order to prove interference with Community's contractual relations with the Bank.[3] Throughout the case, Community's own requested instructions consistently referred to elements of willfulness and intent. Moreover, under Texas law, willfulness and intent are essential elements of a claim of interference with contractual relations. As this Court, speaking of and for Texas, has stated:

> Under Texas law, a tortious interference with a contract entails intentional and willful acts calculated to cause damage and with the unlawful purpose of causing damage to the contracting parties without just cause or lawful right. *See Tippett v. Hart*, 497 S.W.2d 606, 609–11 (Tex.Civ.App., Amarillo 1973), *writ ref'd n. r. e.*, 501 S.W.2d 874 (Tex.1973) (per curiam); *Cooper v. Steen*, 318 S.W.2d 750, 753 (Tex.Civ.App., Dallas 1958, no writ); 33 Tex.Jur.2d *Interference* § 2, at 96. *See also Black Lake Pipeline Co. v. Union Construction Co.*, 538 S.W.2d 80, 91 (Tex.1976); *Clements v. Withers*, 437 S.W.2d 818, 820–21 (Tex.1969); *Leonard Duckworth, Inc. v. Michael L. Field & Co.*, 516 F.2d 952, 955–56 (5th Cir. 1975); *Robey v. Sun Record Co.*, 242 F.2d 684, 687 (5th Cir.), *cert. denied*, 355 U.S. 816, 78 S.Ct. 20, 2 L.Ed.2d 33 (1957).

South Central Livestock Dealers, Inc., et al. v. Security State Bank of Hedley, Texas, 551 F.2d 1346, 1351 (5th Cir. 1977). The special issue was therefore properly submitted to the jury.

We have considered Community's other challenges to the interference with contractual relations judgment and find them to be without merit.

AFFIRMED.

2. As to Waldrep's claim that the District Court improperly dismissed his individual interference action, we find it to be without merit.

3. Special Issue No. 12 provided:

> Do you find from a preponderance of the evidence that the statement by John Tuggle on the occasion in question which you have found interfered with the contractual relations between the bank and Community (if you have so found) were made and done in a willful and intentional manner by Mr. Tuggle to interfere with such contractual relations?

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Response to Application
for Writ of Certiorari

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ATTORNEYS FOR RESPONDENT

DATED: October 7, 1980

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

NO. 80-246

COMMUNITY GRAIN, INC.,
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Respondent.

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for Writ of Certiorari

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DATED: October 7, 1980

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NO. 80-246

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Response to Application
for Writ of Certiorari

STATEMENT OF ISSUE

WHETHER THE UNITED STATES SUPREME COURT SHOULD ISSUE ITS WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE DISTRICT AND CIRCUIT COURTS BELOW, WITH RESPECT TO THEIR INTERPRETATION OF TEXAS LAW AS APPLIED TO CONTRACTS FOR FUTURE DELIVERY OF GRAIN.

STATEMENT OF THE CASE

A. Course of Proceedings.

The application of COMMUNITY GRAIN, INC. for writ of certiorari seeks relief

from the Judgment On Jury Verdict of the United States District Court for the Northern District of Texas dated November 11, 1977. The trial court's judgment was affirmed by the United States Court of Appeals for the Fifth Circuit in an opinion dated March 31, 1980, Cook Industries, Inc. v. Community Grain, Inc., 614 F.2d 978. The motion for rehearing of the applicant, Community Grain, Inc., was denied by the Fifth Circuit on May 16, 1980. This is a diversity case.

B. Statement of Facts.

The Respondent, COOK INDUSTRIES, INC., in the courts below, has recovered a judgment for damages for breach of contract by the applicant. The contract in question was made in July, 1973. Under the contract, Cook was the purchaser and Community was the seller. As is common in

the trading of grain, three separate writings were generated to memorialize the sale. The purchaser, the seller and the broker each issued a written memoranda. Although each contract used slightly different verbiage, all three embodied consistent approaches with respect to the line of delivery. The grain in question was to be deliverable during the months of October, November or December, 1973, but the buyer was given the express right to "carry" or leave the grain in storage after January 1, 1974, at the rate of one cent per hundredweight for each fifteen (15) days following January 1, 1974. The Petitioner, Community Grain, incorrectly states that the option in question in the suit was an option to purchase. The purchase contract was final in July, 1973. The option in question dealt with the purchaser's option to take delivery by January 1 or to leave the grain in storage.

In the trial below, the trade practices in the Texas grain industry and the local trade rules were presented in the presentation of evidence. After having heard such evidence, the jury was asked whether Cook exercised its option to store and the jury answered affirmatively. The Petitioner apparently attacks the legal validity of a judgment founded, in part, on this issue.

ARGUMENT AND AUTHORITIES

The Court should not grant a writ of certiorari in this case.

Supreme Court Rule 19 suggests the factors to be considered by the Court in exercising its discretion. No ground stated in the rule seems to include the situation here. Only one statement in the Rule is even arguably applicable, but the question raised by the applicant hardly

seems to rise to the level of ". . . an important state or teritorial question." U.S. Sup. Ct. Rule 19(1)(b), 28 U.S.C.A. (1977). Even if the question were deemed sufficiently "important," the decisions of the courts below are not "in conflict with applicable state or territorial law." Id.

The applicant suggests that the right to leave grain in storage under the contracts was an "option" and could not be exercised by silence. Although the right in the contracts is referred to as an "option to carry," it is not a true "option contract" in the sense of being an open offer requiring an acceptance to form a future contract, it is, instead a presently granted right of choice contained within the contract. See 1A Corbin on Contracts § 259 (1963). For this reason, the cases from Texas courts cited by the applicant as decisions in conflict with the lower

courts' decisions are actually not applicable to this case. Each of the opinions cited by the applicant are interpretations of rights under true option contracts for the purchase of real estate interests.

Finally, for the Court to grant its writ of certiorari in this case would be inconsistent with its long-standing tradition of not granting the writ to question the consistent interpretation of state law by lower district and appellate courts. E.g., United States v. Durham Lumber Co., 363 U.S. 522, 4 L.Ed.2d 1371, 80 S. Ct. 1282 (1960); Appalachian Power Company v. American Institute of Certified Public Accountants, 4 L.Ed.2d 30, 80 S. Ct. 16 (1959) (Brennan, J., in chambers); Steele v. General Mills, Inc., 329 U.S. 433, 91 L.Ed. 402, 67 S. Ct. 439 (1947).

CONCLUSION

The Respondent, COOK INDUSTRIES, INC., prays the Court to deny the Application for Writ of Certiorari.

Respectfully submitted,

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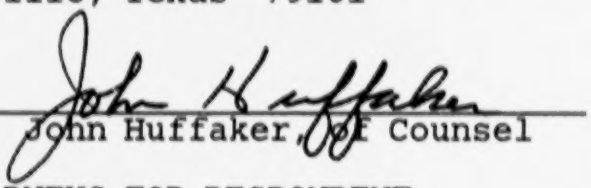
By 
John Huffaker, Of Counsel

ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 1980, a copy of the above and foregoing Response to Application for Writ of Certiorari was mailed postage prepaid to Mr. Raymond C. Caballero, Attorney for Petitioner, Pearson, Caballero & Warach, 1610 State National Plaza, El Paso, Texas 79901. I further certify that all parties required to be served have been served.

John Huffaker

John Huffaker